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Gary A. Collias
West Virginia University College of Law

DOUBLE JEOPARDY IN WEST VIRGINIA: *State ex rel. Dowdy v. Robinson*

In *State ex rel. Dowdy v. Robinson*[1] the West Virginia Supreme Court of Appeals substantially altered the double jeopardy law of the state. Dowdy was indicted for breaking and entering a nightclub. The indictment specified the building's location as 220-22nd Street in Huntington, West Virginia. The proof presented at trial indicated that the nightclub was located at 200-22nd Street. The trial court granted a motion for a directed verdict of not guilty on the ground that the variance[2] was fatal to the prosecution's case.[3] Dowdy was subsequently reindicted for the breaking and entering, the only difference between the second indictment from the first being the address correction. The defense filed a writ of prohibition, contending that a retrial would violate Dowdy's rights under the United States[4] and West Virginia[5] Constitutions not to be placed in double jeopardy. The West Virginia Supreme Court of Appeals agreed. In so ruling it adopted both a new rule on the double jeopardy consequences of an acquittal verdict and an additional test for determining what constitutes the "same offense" for double jeopardy purposes.[6] The court ruled

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[1] 257 S.E.2d 167 (W. Va. 1979).

[2] "A variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment." Dunn v. United States, 442 U.S. 100, 105 (1979), citing Berger v. United States, 295 U.S. 78 (1935).

[3] Both the majority and the dissent in *Dowdy* agreed that the trial court should have either struck the street number as surplusage or should have declared a mistrial for manifest necessity. Either of these actions would have permitted the defendant to be retried.

A retrial is allowed in the case of a mistrial for manifest necessity because the defendant's double jeopardy right is outweighed by the public interest in affording the prosecution one full and fair opportunity to present evidence to the jury. *See* Arizona v. Washington, 434 U.S. 497 (1978). A trial court may strike any part of an indictment so long as it is not a matter of substance but mere form or surplusage. *See* State v. McGraw, 140 W. Va. 547, 85 S.E.2d 849 (1955).

[4] U.S. CONST. amend. V, which provides in pertinent part that no "person be subject for the same offense to be twice put in jeopardy of life or limb."

[5] W. VA. CONST. art. 3, § 5, which provides in pertinent part that "[n]o person shall . . . in any criminal case . . . be twice put in jeopardy of life or liberty for the same offense."

[6] State *ex rel.* Dowdy v. Robinson, 257 S.E.2d 167, 169-70 (W. Va. 1979).

that every acquittal is a complete and absolute bar to any further prosecution for the "same offense" no matter how erroneous the verdict may be.[7] It further held that "same offense," as used in the West Virginia Constitution,[8] shall be defined by either the "same evidence" test or the "same transaction" test, whichever provides the defendant with greater protection against multiple prosecutions.[9] The *Dowdy* case has led to considerable confusion.[10]

I. The Acquittal Test

Prior to *Dowdy* West Virginia law had recognized a distinction between acquittals based on legal grounds and acquittals based on factual grounds. The court had held that "[a]n acquittal of a person on the merits of an offense is a bar to his second prosecution for that offense."[11] West Virginia Code section 61-11-13[12] also granted a defendant double jeopardy protection whenever he was acquitted on the merits by a jury. West Virginia Code section 61-11-14,[13] on the other hand, entitled the state to retry a defendant who had been acquitted on the basis of "a variance between the allegations and the proof of the indictment or other accusation, or upon an exception to the form or substance thereof."[14] In *Dowdy* the court declared section 61-11-14 unconstitutional because it "allows multiple prosecutions of the same defendant for the same offense and expressly provides for a second prosecution

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[7] *Id.* at 169.

[8] *See* note 5 *supra.*

[9] *Id.* at 170.

[10] *See* State *ex rel.* Johnson v. Hamilton, 266 S.E.2d 125, 128 (W. Va. 1980).

[11] State *ex rel.* Zirk v. Muntzing, 146 W. Va. 878, 891, 122 S.E.2d 851, 859 (1961), citing State v. Shelton, 116 W. Va. 75, 81, 178 S.E. 633, 635 (1935).

[12] W. Va. Code § 61-11-13 (1977 Replacement Vol.) provides:
A person acquitted by the jury upon the facts and merits on a former trial may plead such acquittal in bar of a second prosecution for the same offense, notwithstanding any defect in the form or substance of the indictment or accusation on which he was acquitted.

[13] W. Va. Code § 61-11-14 (1977 Replacement Vol.) provides:
A person acquitted of an offense, on the ground of a variance between the allegations and the proof of the indictment or other accusation, or upon an exception to the form or substance thereof, may be arraigned again upon a new indictment or other proper accusation, and tried and convicted for the same offense, notwithstanding such former acquittal.

[14] *Id.*

after an acquittal . . . ."[15] Thus, all acquittals, whether based on legal or factual grounds, serve to bar further prosecution for the same offense in West Virginia.

In support of its holding in *Dowdy* regarding acquittals, the West Virginia Supreme Court of Appeals relied upon two United States Supreme Court decisions, *Sanabria v. United States*[16] and *United States v. Scott*.[17] In *Sanabria* the defendant received a directed verdict of acquittal on a federal gambling charge.[18] The federal offense required that there be a violation of state law in relation to numbers or horse betting. At the end of the prosecution's case the defendant moved that all evidence of numbers betting be excluded because it did not violate the state statute included in the indictment. The court initially denied the motion, but after the defense had rested the court reversed its earlier ruling and granted the defendant's prior motion. The defense then moved for a directed verdict of acquittal because no evidence remained in the record to connect the defendant with the horse racing. The motion was granted.[19]

Writing for the Court, Justice Marshall held that the prosecution was barred from retrying the defendant because his acquittal was granted on the basis of insufficient evidence,[20] the insufficiency being due to an erroneous evidentiary ruling on the part of the trial court.[21] The Court concluded that the defendant was "truly acquitted" because the verdict was "a resolution, correct or not, of some or all of the factual elements of the offense charged."[22] It is important to recognize that the determining factor in *Sanabria* was not the mere use of the word "acquittal," but rather, the nature of the acquittal, that is, the fact the acquittal was based upon the "factual elements" was determinative.

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[15] State *ex rel.* Dowdy v. Robinson, 257 S.E.2d 167, 171 (W. Va. 1979).

[16] 437 U.S. 54 (1978).

[17] 437 U.S. 82 (1978).

[18] 18 U.S.C. § 1955 (1970).

[19] Sanabria v. United States, 437 U.S. 54, 58-59 (1978).

[20] *Id.* at 68-69.

[21] *Id.* The trial court was in error when it excluded all evidence of numbers betting.

[22] *Id.* at 71, quoting Lee v. United States, 432 U.S. 23, 30, n.8 (1977), quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

In *United States v. Scott*[23] the defendant was charged with two federal drug offenses. Although motions by the defendant for a dismissal on the ground of prejudicial preindictment delay[24] were made prior to and during trial, the trial court did not grant the motion until after the defense had rested. On appeal the prosecution sought a reversal of the trial court's ruling. The defendant asserted that the appeal was barred by double jeopardy.[25]

Justice Rehnquist, in authoring the Court's opinion, held that double jeopardy did not prohibit the prosecution's appeal or prevent a new trial because the trial court's ruling was not "a resolution . . . of some or all of the factual elements of the offense charged."[26] The dismissals were not based upon any of the factual elements of the drug offenses for which Scott was indicted, but instead were based upon an erroneous legal interpretation of what constitutes preindictment delay.[27] The trial court was unable to render a decision on the merits because the defendant himself sought to terminate the trial prior to any factual resolution. In such a case double jeopardy does not apply because the defendant has in effect waived his right by requesting a dismissal on purely constitutional or legal grounds as opposed to factual grounds.[28]

Scott and *Sanabria* are distinguishable because in *Scott* the dismissals were based on a constitutional claim while in *Sanabria* the acquittal was based on a lack of evidence of a factual element.[29] The label of "acquittal" or "dismissal" is not important. What is important is that "the ruling of the judge, whatever its label, actually represents a resolution . . . of the factual elements of the offense charged."[30] A "trial judge's characterization of his

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[23] 437 U.S. 82 (1978).

[24] Preindictment delay is a constitutional defense based on the argument that the time between the original accusation and the indictment of the defendant is so long as to prejudice his defense in violation of his right to a speedy trial. *See* United States v. Marion, 404 U.S. 307 (1971).

[25] United States v. Scott, 437 U.S. 82, 84 (1978).

[26] *Id.* at 97, quoting Sanabria v. Scott, 437 U.S. 54, 71 (1978).

[27] United States v. Scott, 437 U.S. 82, 84 (1978).

[28] *Id.* at 93.

[29] Which defenses are constitutional or legal as opposed to factual? The answer seems to be that defenses which go to the jury, such as entrapment, insanity, and self-defense, are factual, while defenses which are decided by the trial court judge, such as preindictment delay, are legal.

[30] United States v. Scott, 437 U.S. 82, 97 (1978), quoting United States v.

own action cannot control the classification of the action."[31] Therefore, regardless of whether the trial judge labels his action a dismissal or an acquittal, the inquiry on review in relation to double jeopardy is whether the action amounts to a resolution of factual issues.

The policy expressed by these two cases is based on the premise that a trial is a fact finding and evaluation proceeding. Its primary purpose is to make a determination on the basis of evidence. If the trial terminates before this determination has been made, it has failed to perform its function. The prohibition against double jeopardy is designed to prevent the government from repeatedly trying "an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[32] Granting double jeopardy protection in cases such as *Scott* does not promote the purpose of a trial because there has been no determination of the factual issues. A trial places a defendant in jeopardy of being found guilty. In *Scott* the defendant himself requested an end to his trial before there was a verdict. If no determination of guilt or innocence has been made on the basis of the evidence, then the defendant never actually risked a guilty verdict. When a dismissal or acquittal is predicated upon an evaluation of the factual elements of a charge, then double jeopardy will surely apply. In such a case the dismissal or acquittal would be the result of a failure of the prosecution's case.

In *Dowdy* the court interpreted *Scott* and *Sanabria* as "according magic" to any and all verdicts of acquittal.[33] The majority concluded that the United States Supreme Court required double jeopardy protection in the case of all acquittals, whether based on factual or legal grounds.[34] In coming to this conclusion the West Virginia court seemed to concentrate upon the fact that Sanabria was acquitted while the charges against Scott were only dismissed. *Scott* and *Sanabria,* however, turn not on the magic of

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Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

[31] *Id.* at 96.

[32] Green v. United States, 355 U.S. 184, 187-88 (1957).

[33] State *ex rel.* Dowdy v. Robinson, 257 S.E.2d 167, 171 (W. Va. 1979).

[34] *Id.* at 169.

the word "acquittal" but on the basis of the acquittal.[35] The fact that the trial court in *Dowdy* termed its action an "acquittal" is not determinative according to the United States Supreme Court standard. Justice Neely, writing for the majority in *Dowdy*, apparently failed to recognize that a "trial judge's characterization of his own action cannot control the classification of the action."[36] Justice Miller pointed this out in his dissent when he wrote that "the trial court's labeling of the motion which terminates the trial will not be controlling, but rather an examination will be made of the underlying record to determine the substantive nature of the court's ruling."[37]

Scott and *Sanabria* clearly support Justice Miller's dissenting opinion. Sanabria's acquittal was "an erroneous resolution in the defendant's favor on the merits of the charge,"[38] while in *Scott* the dismissal was "a legal judgment that a defendant . . . may not be punished because of a supposed constitutional violation."[39] In fact, Justice Brennan's dissent in *Scott* attacks the majority decision for the very reason that it does not grant acquittals unqualified double jeopardy protection.[40]

Dowdy will produce a noticeable change in the manner in which acquittals are granted in West Virginia. Since an acquittal is now synonymous with double jeopardy protection, trial judges should be very reluctant to grant judgments of acquittal. They can be expected to label their rulings "dismissals" whenever possible. By adopting this strategy a judge can eliminate the possibility that he might mistakenly grant double jeopardy protection to a defendant. The West Virginia Supreme Court of Appeals might look beyond the label of "dismissal," but the label of "acquittal" is granted unconditional double jeopardy protection.[41] Judges must now be very careful when they award judgments of acquit-

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[35] Sanabria v. United States, 437 U.S. 54, 71 (1978); United States v. Scott, 437 U.S. 82, 97 (1978).

[36] United States v. Scott, 437 U.S. 82, 96 (1978).

[37] State *ex rel.* Dowdy v. Robinson, 257 S.E.2d 167, 172 (W. Va. 1979) (Miller, J., dissenting).

[38] Sanabria v. United States, 437 U.S. 54, 78 (1978).

[39] United States v. Scott, 437 U.S. 82, 98 (1978).

[40] "The Court's attempt to draw a distinction between 'true acquittals' and other final judgments favorable to the accused, quite simply, is unsupportable in either logic or policy." *Id.* at 103 (Brennan, J., dissenting).

[41] *See* State *ex rel.* Dowdy v. Robinson, 257 S.E.2d 167, 169 (W. Va. 1979).

tal. *Dowdy* gives acquittals a clear meaning, the consequences of which even laymen will have no difficulty in understanding. The defendant will have the advantage of knowing for certain if another trial is possible.

II. The Same Offense Test

Justice Neely stated in *Dowdy* that "no retrial on the same offense is permissible" after a judgment of acquittal.[42] Having determined that the defendant had in fact been acquitted, the court shifted its focus to the issue of whether the prosecution was attempting to try Dowdy for the "same offense." The court ruled that the "same offense" had been charged in both indictments.[43] In so ruling, the court discussed two tests which can be used in determining the meaning of "same offense." Justice Neely initially focused on the "same evidence" test, which was adopted by the United States Supreme Court in *Blockburger v. United States*.[44] The "same evidence" test requires that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[45] Prior to *Dowdy* this was the rule in West Virginia.[46] The West Virginia Supreme Court of Appeals also considered the "same transaction" test in *Dowdy*. It provides that offenses are the same if they "grow out of a single criminal act, occurrence, episode, or transaction."[47] The "same transaction" test has received only limited support in the United

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[42] *Id.*

[43] *Id.* at 171.

[44] 284 U.S. 299 (1932).

[45] *Id.* at 304. It is not enough for one offense to have an element which the other offense does not in order for them to be different offenses according to the "same evidence" test. *Each* offense must contain an element which the other does not contain. For example, joyriding and auto theft are the "same offense" because auto theft contains all of the elements of joyriding plus an additional element, i.e., the intent to permanently deprive the owner of his automobile. Lesser included offenses will always be the "same offense" under the "same evidence" test. *See* Brown v. Ohio, 432 U.S. 161 (1977).

[46] *See* State v. Pietranton, 140 W. Va. 444, 84 S.E.2d 774 (1954); State v. Taylor, 130 W. Va. 74, 42 S.E.2d 549 (1947); State v. Friedley, 73 W. Va. 684, 80 S.E. 1112 (1914).

[47] *See* Brown v. Ohio, 432 U.S. 161, 170 (1977) (Brennan, J., concurring), quoting Ash v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring).

States Supreme Court.[48] The court in *Dowdy* decided to "adopt both the 'same evidence' test and the 'same transaction' test for determining whether the 'same offense' is involved for double jeopardy purposes with an accompanying rule that whichever test affords the defendant the greater protection . . . must be applied."[49]

Justice Neely acknowledged that the court was extending broader protection to defendants on the basis of the West Virginia Constitution than the United States Supreme Court granted under the federal Constitution.[50] The adoption of this dual standard has led to much confusion regarding the "same offense" concept.

In *State ex rel. Johnson v. Hamilton*[51] the court attempted to dispel the confusion surrounding the new "same offense" test.[52] The court said the confusion resulted from the fact that double jeopardy has two elements. It protects a defendant against multiple trials for the same offense and against multiple punishments for the same offense in a single trial. While the "same evidence" test applies to both elements of double jeopardy, the "same transaction" test applies only to multiple trials and not to multiple punishments in a single trial.[53] The "same transaction" test, the court continued, "does not preclude separate punishments for separate crimes."[54] But if by "separate crimes" the court means crimes that are not the "same offense," then it has devised "a

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[48] Apparently only Justices Brennan and Marshall support the adoption of the "same transaction" test. *Id.*

[49] State *ex rel.* Dowdy v. Robinson, 257 S.E.2d 167, 170 (W. Va. 1979).

[50] *Id.* For authority to extend broader protection see State *ex rel.* Whitman v. Fox, 236 S.E.2d 565 (W. Va. 1977).

[51] 266 S.E.2d 125 (W. Va. 1980). The defendant in *Johnson* was convicted of the murder of a son. He sought a writ of prohibition to prevent himself from being tried for the murder of the son's father, since both killings grew out of the same transaction. The court ruled that the defendant could be tried for the murder of the father because the trial for the murder of the son had taken place prior to the *Dowdy* decision. *Dowdy*, the court declared, is to be applied prospectively and not retroactively. If the first trial in *Johnson* had taken place after the *Dowdy* case was decided the trial for the murder of the father would not have been permitted under the "same transaction" test.

[52] *Id.* at 128.

[53] *Id.*

[54] *Id.*

clever procedural paradox."[55] The very standard the court adopted in *Dowdy* for determining what constitutes the "same offense" makes use of the "same transaction" test which the court says does not apply to a single trial if the defendant is not receiving multiple punishments for the "same offense."[56] In other words, the court is saying that the "same transaction" test is used to determine what is the "same offense," but at the same time saying that the "same transaction" test applies to multiple punishments only if they are not for the "same offense." The "same offense" concept is being overworked. It is being made to serve in two different stages of double jeopardy analysis with a different meaning in each place.

An example may serve to demonstrate the paradox better. If a person were to kidnap, rape, rob, and murder his victim in a single criminal episode the "same offense" test adopted in *Dowdy* would require that all of the charges be tried in a single trial because they all stem from the "same transaction." For double jeopardy purposes all of the charges are the "same offense." The court, however, says that this "does not preclude separate punishments for separate crimes."[57] But how can the defendant be punished separately for the crimes of kidnapping, rape, robbery, and murder if the court has already determined that they are the "same offense" under the "same transaction" test? Logically, he cannot be punished separately unless there are two independent "same offense" tests. West Virginia, however, has but a single "same offense" test. It is the same test as before *Dowdy*, that is, the "same evidence" test.

As a practical matter, *Dowdy* did not adopt both the "same evidence" test and the "same transaction" test for determining what qualifies as the "same offense." This would involve a paradox as demonstrated by the above example. Rather, *Dowdy* affirmed the "same evidence" test for "same offense" purposes and adopted the "same transaction" test as a procedural rule of joinder under the guise of double jeopardy protection. The core of the double jeopardy principle has always been the "same offense"

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[55] *Id.* at 130 (Miller, J., concurring).
[56] *Id.* at 128.
[57] *Id.*

concept.[58] If the offenses are not the same, then double jeopardy analysis does not apply.[59] The "same evidence" test still applies to both elements of double jeopardy, that is, multiple trials and multiple punishments in a single trial. The "same transaction" test, however, applies only to multiple trials and thus functions independently from the "same evidence" test. The "same transaction" test merely requires the joinder of offenses if the offenses grow out of a single transaction. It does not address the issue of whether the various offenses qualify as being the "same offense." It is unfortunate that the court adopted the "same transaction" test in such a way as to cause so much confusion.

The court has created several potential problems by adopting the "same transaction" test. By conferring constitutional status upon what amounts to a rule of joinder of offenses, the court has made it questionable whether a defendant can waive his right to joinder by requesting a severance. Courts have generally taken a position against waiver of the constitutional right to double jeopardy.[60] Since the court created the right to joinder, it would probably rule that it could be waived by a requested severance. The *Dowdy* decision raises another question. Would a defendant waive his joinder right by pleading guilty to one of several offenses arising out of the "same transaction"? The court would almost have to consider this a waiver in order to prevent defendants from pleading guilty to minor offenses in an attempt to escape prosecution for major offenses.

III. Conclusion

The decisions in *Dowdy* to make acquittals synonymous with double jeopardy protection and to adopt the "same transaction" test are related. The acquittal test controls when double jeopardy analysis applies and the "same transaction" test determines the nature of that analysis. Both parts of the decision are an attempt by the court to extend the greatest possible assistance to the individual in securing double jeopardy protection. The right to be free from double jeopardy is certainly worthy of protection. The question that must be asked in the final analysis is whether the

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[58] *Id.* at 130 (Miller, J., concurring).

[59] *Id.*

[60] *See, e.g.*, United States v. Anderson, 514 F.2d 583 (7th Cir. 1975).

court has gone too far in providing this protection. In judging the ultimate wisdom of the court's decision, there must be a balancing of the interest of society in convicting criminals against the interest of the individual defendant in being protected from the state. The policy behind the double jeopardy provision is primarily the protection of the innocent from the power of the government. Whether this policy is advanced by prohibiting the retrial of a defendant who has been "acquitted" on the basis of a mistaken legal interpretation, or whether it is advanced by requiring the prosecution to join all of the charges against a defendant in a single trial can receive no definitive answer at this time.[61]

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[61] The reader's attention should be drawn to State *ex rel.* Watson v. Ferguson, 274 S.E.2d 440 (W. Va. 1980). This case was decided too late to be analyzed in the text of this article. In *Watson* the court declared that "where multiple homicides occur even though they are in close proximity in time, if they are not the result of a single volitive act of the defendant, they may be tried and punished separately. . ." *Id.* at 448. Apparently West Virginia has abandoned the "same transaction" test in favor of a "same act" test. The *Watson* decision is clearly inconsistent with *Dowdy* and *Johnson*. No pattern emerges from this line of cases.